Supreme Court, U.S.
FILED

941981 JUN 2 - 1995

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

ROLAND C. BRASWELL,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

D. Lynn Whitted
Counsel of Record
Post Office Box 10615
Goldsboro, NC 27532
(919)735-8738

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

5400

QUESTION PRESENTED

Whether the prosecution's announcement to the grand jury of the witness' anticipated perjury and its invitation to the grand jurors to facilitate that perjury and thus participate in its commission, is a species of prosecutorial misconduct that may be remedied by dismissing an indictment..

A. The right to a fair and impartial grand jury is a fundamental constitutional right, the abrogation of which warrants dismissal of an indictment.

B. In addition to constitutional grounds, the court's supervisory powers may nonetheless be invoked to dismiss indictments based upon prosecutorial misconduct where that misconduct is of constitutional proportions.

STATEMENT OF PARTIES

The parties in the United States District Court were the United States of America versus Roland C. Braswell, Defendant. On appeal to the Fourth Circuit Court of Appeals the parties were the United States of America, Plaintiff-Appellant versus Roland C. Braswell, Defendant-Appellee (No. 93-5770) and the United States of America, Plaintiff-Appellee versus Roland C. Braswell, Defendant-Appellant (No. 93-5813). There has been no change in identity of the parties.

The parties to the within petition are the United States of America, Appellee versus Roland C. Braswell, Defendant-Appellant.

TABLE OF CONTENTS

SUBJECT INDEX

Question Presented i
Statement of Parties ii
Table of Contents iii
Table of Authorities v
Face Page 1
Opinion Below 2
Jurisdiction 2
Constitutional Provisions 2
Statement of Case 3
Reasons for Granting Writ 7
Argument 8
Conclusion 25

APPENDIX INDEX

EXHIBIT A February 8, 1995 Unpublished Decision of the Fourth Circuit Court of Appeals reinstating perjury convictions and remanding for resentencing 1a

EXHIBIT B Decision of the District Court granting Motion for Judgment of Acquittal on perjury counts 10a

EXHIBIT C March 7, 1995 decision of Fourth Circuit Court of Appeals denying petition for rehearing and suggestion for rehearing in banc 15a

EXHIBIT D Fifth Amendment to the United States 17a

EXHIBIT E Notice of Appeal of reinstated perjury convictions and resentence 18a

TABLE OF AUTHORITIES

CASES

Arizona v. Fulminante,
499 U.S. 279, 111 S. Ct. 1246,
113 L. Ed 2d 302 (1991) reh. denied 500 U.S. 938,
111 S. Ct. 2067, 114 L. Ed. 2d 472 (1991) 12

Ballard v. United States, 329 U.S. 187, 67 S. Ct. 261,
91 L. Ed. 181 (1946) 11, 12

Bank of Nova Scotia v. United States, 487 U.S. 250,
108 S. Ct. 2369,
101 L. Ed. 2d 228 (1988) 10, 11, 13, 14, 20-23

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629,
79 L. Ed. 134 (1935) 24

Branzburg v. Hayes, 409 U.S. 665, 92 S. Ct. 2646,
33 L. Ed. 2d 626 (1972) 16

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824,
17 L.Ed. 2d 705 (1967) 18

Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370,
50 L. Ed. 652 (1906) 15

In Re Walsh, 623 F. 2d 489 (7th Cir. 1980) 15

Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L.
Ed. 2d 460 (1986) 11

United States v. Antonelli Fireworks Co., 155 F. 2d 631 (CA2) cert. denied 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946) 18

United States v. Borello, 766 F. 2d 46 (CA2 1985) . . 18

United States v. Burns, 990 F. 2d 1426 (4th Cir. 1993) cert. denied ___ U.S. ___, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) 21

United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) 15, 19

United States v. Chanen, 549 F. 2d 1306 (9th Cir.) cert. denied 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977) 17

United States v. Ciambrone, 601 F. 2d 616 (2nd Cir. 1979) 16

United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975) aff'd. on other grounds 550 F. 2d 1224 (9th Cir.) cert. denied 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977) 17

United States v. Isgro, 974 F. 2d 1091 (9th Cir. 1992) cert. denied 113 S. Ct. 1581, 123 L. Ed. 2d 148 (1992) 8

United States v. Lamantia, 856 F. Supp. 424 (N.D., E.D. Ill. 1994) 14

United States v. Larrazolo, 869 F. 2d 1354 (9th Cir. 1989) 8

United States v. Leverage Funding Systems, Inc., 637 F. 2d 645 (9th Cir. 1980) 17

United States v. Mara, 411 U.S. 19 . . . . . 6, 10

United States v. Martin, 480 F. Supp 880 (S. D. Tex. 1979) 16

United States v. McKenzie, 524 F. Supp. 186 (E. D. La. 1981) 16

United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) 18, 22, 23

United States v. Mills, 995 F. 2d 480 (4th Cir. 1993) cert. denied ___ U.S. ___, 114 S. Ct. 283, 126 L. Ed. 2d 233 (1993) 22

United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) 17

United States v. Samango, 607 F. 2d 877 (9th Cir. 1979) 16

United States v. Udziela, 671 F. 2d 995 (7th Cir.) cert. denied 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353 (1983) 17

United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L.Ed. 2d 352 (1992) 6, 10, 19, 21

United States v. Wells, 163 F. 313 (D. Idaho 1908) . . 17

United States v. Zarattini, 552 F. 2d 753 (7th Cir. 1977) cert. denied 431 U.S. 942, 97 S. Ct. 2661, 53 L. Ed. 2d 262 (1978) 16

Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) 11

Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST., amendment V 15

MISCELLANEOUS SOURCES

Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433 (1984) 21

Holdeman, Preindictment Prosecutorial Conduct in the Federal System, 71 J. Crim. L. & C., (1980) 16

Kaufman, The Grand Jury and Its Role and Its Powers, 17 F.R.D. 331 (1955) 15

B.J. Moore, Federal Practice, (2nd ed. 1981) 16

Note: Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence, 38 Wash. & Lee L. Rev. 110 (1981) 20

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED STATES OF AMERICA
Appellee

vs.

ROLAND C. BRASWELL
Appellant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Roland C. Braswell prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on February 8, 1995. Petition for Rehearing and Suggestion for Rehearing in Banc were denied by order dated and entered March 7, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was issued in an Unpublished Per Curiam opinion dated February 8, 1995 and entered on the 8th day of February, 1995. A copy of this opinion is included in the APPENDIX hereto as EXHIBIT "A".

The opinion of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and suggestion for rehearing in banc was dated and filed March 7, 1995. A copy of this decision is included in the APPENDIX hereto as EXHIBIT "C".

The District Court's decision granting the motion to dismiss the perjury counts of the indictment appears in the APPENDIX hereto as EXHIBIT "B".

JURISDICTION

Jurisdiction in this cause is premised upon Title 28 USC Section 1254(1) for review, by certiorari, of the Judgment and opinion of the United States Court of Appeals for the Fourth Circuit. A written Per Curiam Opinion was dated by that court on the 8th day of February, 1995 and entered on the 8th day of February, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the United States Constitution are set forth in the APPENDIX hereto as EXHIBIT "D".

STATEMENT OF THE CASE

Roland C. Braswell, an attorney, was investigated by the Internal Revenue Service and was accused of helping his clients conceal profits from illegal drug trafficking activity. He was indicted for Conspiracy to Impede the Collection of Income Taxes (Klein Conspiracy) and for two counts of Perjury. This indictment formed the basis for federal jurisdiction in the court of first instance. The perjury charge from which this appeal arises stems from Mr. Braswell's testimony before a federal grand jury on August 19, 1992. On that date, and prior to the testimony of Mr. Braswell, the Assistant United States Attorney was guiding Special Agent Terrance O'Brien of the Internal Revenue Service through his testimony. At 10:05 a.m., immediately prior to taking a five (5) minute break, the following occurred:

> "PROSECUTRIX: Okay, do you want to go now to the - to the sale of the farm then we'll go into Mr. Braswell's explanations for all of this?
>
> FOREPERSON: Excuse me. Do we need to take a break?
>
> PROSECUTRIX: Let me ask you one-
>
> FOREPERSON: Yeah.
>
> PROSECUTRIX: -One thing. Mr. Braswell - we've invited him to appear in front of the jury. So right now he may be outside with his attorney, so I'd ask you not to make any comments about any of this

> because we anticipate that Mr. Braswell may perjure himself in front of you, and I want him to - us to have a very friendly atmosphere so that he feels very at ease in giving his explanations for this type of thing. And then we may - we're going to have another witness come in later with some other information. Is there anything you want to say about that - so I'd ask you please not say a word, because I anticipate they'd be out there right now."
> [Ct. of Appeals Appx. II, page 61].

At 11:16 a.m. on August 19, 1992, the defendant, Roland Braswell, voluntarily appeared before the grand jury immediately after agent O'Brien completed his testimony. Statements made by Mr. Braswell during his testimony led to charges of perjury.[1]

---

[1] Two former clients of attorney Braswell, Canady and Riggs, had been convicted of drug trafficking crimes and had subsequently become government witnesses. Based upon information supplied by them, Braswell stood accused of helping his former clients conceal the profits from their illegal drug trafficking activities through the use of sham corporations and other devices.

The perjury charges stemmed from Braswell's testimony before the grand jury about documents purporting to be the corporate records of corporations he had established for Canady and Riggs, which records were voluntarily produced by Braswell.

After repeated questioning as to the date on which the documents were prepared, the government presented witnesses who testified that the documents were recent fabrications based upon the date of the manufacture of the paper and indentation analysis.

Braswell was indicted on 16 counts. Count One charged conspiracy to defraud the United States by impeding the collection of taxes. Counts Two through Seven charged the misdemeanor crime of willful failure to file tax returns. Counts Eight through Fifteen each

Defendant was convicted of one count of the Klein Conspiracy and two counts of Perjury.

After trial defense counsel made a motion for judgment of acquittal on the conspiracy and two perjury convictions. [Ct. of Appeals Appx. I, page 197]. The basis for the motion was misconduct of the prosecutrix before the grand jury and the influence of that misconduct on the grand jury. The District Court granted the motion as to the two perjury convictions but denied it as to the Conspiracy conviction. [Ct. of Appeals Appx. I, page 243]. Mr. Braswell appealed the failure of the District Court to dismiss all the indictment counts and the government cross-appealed the District Court's granting of acquittal on the two perjury convictions.

The District Court's order granting acquittal contained the following language:

> "The Court finds that under the circumstances of this case the prosecutor's statements to the grand jury were such a prejudicial character that the indictments on the perjury charges should be dismissed and judgment of acquittal should be entered on

---

charged perjury for statements before the grand jury. Count Sixteen charged the crime of aiding or assisting the filing of a false tax return.

Braswell pleaded guilty to the six misdemeanor charges (Counts Two through Seven). The trial on the remaining counts proceeded. At the close of the government's case the defendant moved for judgment of acquittal. The motion was granted in part and Counts Nine through Fourteen were dismissed (6 of the 8 perjury counts) as duplicative. Braswell was found guilty of Counts One, Eight and Fifteen (the Klein conspiracy and the two remaining perjury counts) and acquitted of Count Sixteen.

those charges. The statements by the prosecutor telling the grand jury that they could expect the defendant, who was then only a witness and either a subject or a target before the grand jury, to commit perjury when he later came before them was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing, they would lose their neutrality and would invite abuse. *Untied States v. Mara*, 411 U.S. 19, 29 (1973) (Douglas, J., dissenting)" [APPENDIX EXHIBIT "C"] [Ct. of Appeals Appx. I, page 246-247].

On February 8, 1995, the Court of Appeals for the Fourth Circuit issued its decision in which it affirmed the defendant's conviction on the Klein conspiracy (remanding for resentencing) and reinstated the two perjury counts [APPENDIX EXHIBIT "A"]. The Court of Appeals remanded the case for resentencing on all counts with instructions that the District Court make findings of fact

as to whether defendant is subject to sentencing under the Guidelines. Defendant's subsequent motion for rehearing and suggestion for rehearing in banc were denied by order dated March 7, 1995 [APPENDIX EXHIBIT "B"].

Defendant is currently appealing to the Fourth Circuit Court of Appeals both the perjury conviction as reinstated as well as the resentence on remand. [APPENDIX EXHIBIT "E"].

REASONING RELIED ON FOR ALLOWANCE OF THE WRIT

It is respectfully submitted that the Fourth Circuit Court of Appeals has decided the federal question raised herein in a way which far departs from the accepted and usual course of judicial proceedings and in conflict with the decisions of the United States Supreme Court, requiring clarification by this Court of the source of and limitations on the power to dismiss indictments.

ARGUMENT

THE PROSECUTION'S ANNOUNCEMENT TO THE GRAND JURY OF THE WITNESS' ANTICIPATED PERJURY AND ITS INVITATION TO THE GRAND JURORS TO FACILITATE THAT PERJURY AND THUS PARTICIPATE IN ITS COMMISSION, IS A SPECIES OF PROSECUTORIAL MISCONDUCT THAT MAY BE REMEDIED BY DISMISSING AN INDICTMENT.

A. The right to a fair and impartial grand jury is a fundamental constitutional right, the abrogation of which mandates dismissal of an indictment, rendering a harmless error inquiry inappropriate.

Federal courts draw their power to dismiss an indictment from two distinct sources. First, "a court may dismiss an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the grand jury proceeding." *United States v. Isgro,* 974 F. 2d 1091 (9th Cir. 1992) cert. denied 113 S. Ct. 1581, 123 L. Ed. 2d 148 (1992).

Constitutional error is found where the "structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice to the defendant." *United States v. Larrazolo*, 869 F. 2d 1354, 1357-58 (9th Cir. 1989). Additionally, constitutional error may be found "if the independence of the grand jury is substantially infringed." *Id.* at 1358.

Second, a district court may draw upon its supervisory powers to dismiss an indictment. (See Point B, Infra).

It is submitted that the decision by the District Court Judge dismissing the perjury counts herein was manifestly correct (although it it further submitted that the entire indictment should have been dismissed) and that said dismissal was clearly based upon the former constitutionally granted authority. Assuming arguendo that this court finds the decision of the District Court was not based upon constitutional grounds it is urged in Point B, Infra, that the District Court was equally justified in exercising its supervisory powers to dismiss the instant indictment.

The District Court decision specifically articulated its finding that the grand jury was deprived of its neutrality:

> "The Court finds that under the circumstances of this case the prosecutor's statements to the grand jury were such a prejudicial character that the indictments on the perjury charges should be dismissed and judgment of acquittal should be entered on those charges. The statements by the prosecutor telling the grand jury that they could expect the defendant, who was then only a witness and either a subject or a target before the grand jury, to commit perjury when he later came before them was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to

> the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing, they would lose their neutrality and would invite abuse. *Untied States v. Mara*, 411 U.S. 19, 29 (1973) (Douglas, J., dissenting)" [APPENDIX EXHIBIT "B"] [Ct. of Appeals Appx. I, page 246-247].

In this case the District Court correctly dismissed the perjury counts when it found that the effect of the prosecutorial misconduct usurped the role of the grand jury thus violating the defendant's fundamental right to a fair proceeding.

Such a finding is supported by this Court's decision in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) which holds the harmless error rule inapplicable to that "class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental...(T)hese cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the

presumption of prejudice." *Id.* 487 U.S. 250, 256-257, 108 S. Ct. 2369, 2374. See *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3105-3106, 92 L. Ed. 2d 460 (1986).

Such defects of constitutional proportion are exemplified by *Vasquez v. Hillery,* 474 U.S. 254, 260-264, 106 S. Ct. 617, 621-624, 88 L. Ed. 2d 598 (1986) wherein racial discrimination in the selection of grand jurors was held to compel dismissal and *Ballard v. United States,* 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946) compelling a like result where women were excluded from the grand jury.

It is submitted that just such a situation is presented herein - that the egregious nature of the prosecutorial misconduct in this case allows a presumption that the defendant was prejudiced and any inquiry into harmless error would require unguided speculation.

While the Circuit Courts of Appeals seem to be in agreement that *Bank of Nova Scotia, supra,* is inapplicable to cases of constitutional proportions, there is no definition of what conduct might amount to the "appropriate case" for such treatment. By applying the *Bank of Nova Scotia, supra,* standard that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded" to every instance of prosecutorial misconduct, courts ignore the exception created by the Supreme Court in the application of that standard. *Id.* 487 U.S. at 255, 108 S. Ct. at 2373.

Indeed, the Supreme Court cautioned in *Bank of Nova Scotia, supra:*

[i]n the cases before us we do not inquire

> whether the grand jury's independence was infringed. Such an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict...[w]e note that the Court of Appeals found that the prosecution's conduct was not 'a significant infringement on the grand jury's ability to exercise independent judgment' [citation omitted] and we accept that conclusion." *Id.* 487 U.S. at 268, 108 S. Ct. at 2376.

The Supreme Court recently addressed the distinction between fundamental error and simple rule violations in *Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), reh. denied 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 472 (1991). The test articulated by the Court therein clarifies whether a violation of a criminal defendant's constitutional rights is so fundamental to our system of democracy that prejudice is presumed, or whether the violation merely requires analysis under the "harmless error" doctrine.

The *Fulminante, supra,* Court (examining whether admission into evidence of an involuntary confession required an automatic reversal or whether defendant had to show actual prejudice) noted the harmless error doctrine was not appropriate where structural defects in the administration of criminal justice were implicated. These errors of constitutional magnitude have been held to include the unlawful exclusion of members of a defendant's race and gender. See *Vasquez, supra* and *Ballard, supra.*

The difference is apparent in decisions where courts reviewed structural defects in the grand jury process

and ultimately dismissed those indictments. Indeed, the Court in *Vasquez, supra,* expanded on the necessity of dismissal of indictments in such a case, holding that invalid indictments cannot be cured by a subsequent error-free trial since the grand jury shapes the indictment and therefore substantially influences the way in which a case is put before a petit jury. *Id.* 474 U.S. at 263, 106 S. Ct. at 623.

It is submitted that this case has constitutional import that goes far beyond a mere breach of secrecy or violation of a rule of procedure.

The *Fulminante, supra,* formula is clearly distinguishable from the standard applied in *Bank of Nova Scotia, supra,* on which the Court of Appeals relied in the case at bar. In *Bank of Nova Scotia* a district court dismissed an indictment on the grounds that the prosecution had violated FRCP Rules 6(d) and (e) in putting a case before the grand jury. The Supreme Court found that Federal Rule of Criminal Procedure 52(a) applied to the prosecutorial misconduct at issue and that the district court did not have authority to dismiss the indictment absent a showing of prejudice to defendant. *Id.* 487 U.S. at 255, 108 S. Ct. at 2371.

The distinction between the facts in the instant case and in *Bank of Nova Scotia, supra,* is apparent. The errors treated in *Bank of Nova Scotia* did not arise from the grand jury itself, but concerned matters placed before the grand jury. There is a shocking and fundamental difference between the prosecutorial misconduct at issue in *Bank of Nova Scotia* and the indictment herein in which the grand jurors were importuned to abandon their role and join the prosecutrix in the facilitation of anticipated

perjury.

Prosecutorial misconduct concerning matters of evidence presented to a grand jury may be subjected to a harmless error doctrine under *Bank of Nova Scotia, supra.* A reviewing court is able to sort out the prosecutor's statements and determine if defendant has been prejudiced. Where, however, the misconduct goes beyond the evidence, and involves the grand jury itself in the misconduct, a reviewing court could never filter out or erase the taint that the conduct had on the grand jury's indictment.

In a similar vein, in *United States v. Lamantia,* 856 F. Supp. 424 (N.D., E.D., Ill. 1994) the District Court found that the harmless error doctrine was inapplicable to defendant's claim that the indictment should be dismissed due to a grand juror's conviction for contempt of court and bribery which caused a structural defect in the grand jury process.

It is respectfully submitted that the District Court's dismissal of the indictment herein was based upon fundamental constitutional grounds and did not represent a use of supervisory power. Accordingly, the Fourth Circuit Court of Appeals inappropriately applied the standard set forth in *Bank of Nova Scotia, supra* for the exercise of supervisory powers and failed to address the fundamental constitutional grounds relied upon by the trial court.

B. In addition to constitutional grounds, the district courts' supervisory powers may nonetheless be invoked to dismiss indictments based upon prosecutorial misconduct where that misconduct is of constitutional proportions.

To place the importance of the role of a fair and impartial grand jury in historical perspective, under the English rule of law where criminal prosecutions were instituted by the King at the behest of private prosecutors, "the most valuable function of the grand jury was not to examine into the commission of crimes, but to stand between the prosecutor and the accused and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale v. Henkel,* 201 U.S. 43, 59, 26 S. Ct. 370, 372, 50 L. Ed. 652 (1906). Accord, *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed. 2d 569 (1962); *Kaufman, The Grand Jury and Its Role and Its Powers,* 17 F.R.D. 331, 335 (1955).

Indeed, the drafters of the United States Constitution placed great emphasis on this role when they elevated the grand jury to constitutional status, embodied in the Fifth Amendment command that no federal prosecution shall occur, "unless on a presentment or indictment of a grand jury." *U.S. Constitution, amendment V.* This Court has acknowledged that the framers thought the grand jury essential to preserve our basic liberties. See *United States v. Calandra,* 414 U.S. 338, 343, 94 S. Ct. 613, 617, 38 L. Ed. 2d 561 (1974). Thus, "the grand jury performs the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *In re Walsh*, 623 F. 2d 489, 492 (7th Cir.

1980) quoting *Branzburg v. Hayes,* 409 U.S. 665, 686-687, 92 S. Ct. 2646, 2659, 33 L. Ed. 2d 626 (1972). See also *United States v. Zarattini,* 552 F. 2d 753, 756 (7th Cir. 1977), cert. denied 431 U.S. 942, 97 S. Ct. 2661, 53 L. Ed. 2d 262 (1978).

Despite its status as an instrument of justice, as a practical matter the modern grand jury is greatly dependent on the United States Attorney "to present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles." *United States v. Ciambrone*, 601 F. 2d 616, 622 (2nd Cir. 1979). See also *B. J. Moore, Federal Practice,* p. 6.02(1) (2d ed. 1981).

Recognizing this increasing dependency, federal courts were for some time sensitive to allegations of governmental misconduct before the grand jury and demonstrated willingness to curb prosecutorial abuse in those proceedings. See, generally, *Holdeman, Preindictment Prosecutorial Conduct in the Federal System,* 71 J. Crim. L. & C. 1, 16-19 (1980).

Thus in countless cases where over-zealous prosecutors manipulated a grand jury by wilfully misleading it or knowingly presented false evidence courts did not hesitate to exercise their power to dismiss indictments. See, e.g., *United States v. Samango,* 607 F. 2d 877 (9th Cir. 1979) (dismissed for failing to inform the grand jury of its authority to subpoena witnesses); *United States v. McKenzie,* 524 F. Supp. 186 (E.D. La. 1981) (dismissed where prosecutors placed undue pressure on grand jury to indict); *United States v. Martin,* 480 F. Supp. 880 (S.D. Tex. 1979) (dismissed for failure to reveal agreement not to prosecute to grand jurors); *United States*

v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) (dismissed for questioning a witness outside the presence of the grand jury and then failing to inform the grand jury the testimony was exculpatory); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975) aff'd on other grounds 550 F. 2d 1224 (9th Cir.), cert. denied 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977) (dismissed for failure to disclose vital information to the grand jury necessary to the grand jury's informed and independent judgment); *United States v. Wells*, 163 F. 313 (D. Idaho 1908) (dismissed where prosecutor expressed his opinion that defendants were guilty and that the grand jury should indict them).

As observed by the Seventh Circuit Court of Appeals in *United States v. Udziela*, 671 F. 2d 995 (7th Cir.) cert. denied 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353 (1982), these cases generally involved serious or blatant prosecutorial misconduct. "The dismissals in those decisions whether based on constitutional grounds or the federal courts supervisory powers, reflected the Court's fundamental concern for protecting the integrity of the judicial process, 'particularly the function of the grand jury from unfair or improper prosecutorial conduct.' *United States v. Chanen*, 549 F. 2d 1306, 1309 (9th Cir.) cert. denied 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977)..." *Udziela, supra* at 998.

Strictly speaking the grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch, see *United States v. Leverage Funding Systems, Inc.*, 637 F. 2d 645, 649 (9th Cir. 1980), though it often relies on both when performing its duties. In light of the subtle yet distinct relationships among these three constitutionally authorized entities, courts have more

recently taken great care not to encroach on legitimate activities before the grand jury, making them extremely cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor.

Despite this reluctance, the Supreme Court has recognized that the harmless error doctrine, denying a remedy in cases of clear prosecutorial misconduct "can work very unfair and mischievous results." *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The result we are left with today was foretold by Mr. Justice Marshall who warned "denying defendants relief for clear violations of their procedural rights 'reduces the law to pretend rules.' *United States v. Borello,* 766 F. 2d 46 (CA2 1985), quoting *United States v. Antonelli Fireworks Co.,* 155 F. 2d 631 (CA2) (Frank, J., dissenting), cert. denied, 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946); it means that prosecutors are free to engage in prohibited conduct subject only to 'purely ceremonial' words of appellate displeasure." *United States v. Mechanik,* 475 U.S. 66, 83, 106 S. Ct. 938, 948, 89 L. Ed. 2d 50 (1986) (Marshall, J., dissenting).

Nowhere is this result more clear than in the Court of Appeals decision in this case, which begins with the words "[t]his is a troubling case" and proceeds to take the office of the United States Attorney to task for its misconduct, expressing displeasure at the instant misconduct being added to that which might form a precedent for dismissal (in some other case) and then ordering the decision unpublished to deprive it of precedential value.

With each "look the other way" decision government attorneys have become bolder - pushing prosecutorial misconduct beyond its now non-discernible limits.

The Court is urged herein to establish those limits with greater precision and
to define the guidepost of defects of "constitutional proportion" so as to give the words the meaning intended.

> "We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a 'protector of citizens against arbitrary and oppressive governmental action.' *United States v. Calandra, supra*, 414 U.S. at 343, 94 S. Ct. at 617...It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor - on whose knowledge of the law the jurors will, of necessity, rely." *United States v. Williams,* 504 U.S. 36, 112 S. Ct. 1735, 1753, 118 L. Ed. 2d 352 (1992) (Stevens, J., Dissenting).

The Due Process Clause of the Fifth Amendment is patently violated when a defendant has to stand trial on an indictment which is not returned by a fair and impartial grand jury.

Despite this, cases which have followed *Bank of*

Nova Scotia, supra, not only have cut back on the reach of the exception carved out by the Supreme Court, but have eliminated it.

While we recognize the necessity of approaching with care the delicate balance between the grand jury's independence and aggressive prosecution, as one commentator aptly put it ... "a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury." *Note. Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence,* 38 Wash. & Lee L. Rev. 110, 117 (1981).

Indeed the Court of Appeal's decision in the case at bar expressed what appeared to be sympathy for the district court judge:

> "We do not leave the subject, however, without stating our frustration. Every now and then a district judge is required to take an action which he is bound to know is borderline, but which must be taken or else he turns his courtroom over to the attorneys, in this case, the prosecutrix. This is such a case. The conduct of the prosecutrix before the grand jury in this case was without justification and the fact that we have not sustained the judgment of acquittal does not mean that we approve the conduct. Her seeming invitation to the grand jury to join the prosecution certainly is not worthy of approbation, and it certainly is no help to the office of the U.S. Attorney in which the conduct took place

> that this might well be an act which could be considered a part of a history of prosecutorial misconduct so as to raise a substantial and serious question about the fundamental fairness of the process which resulted in indictment in some future case. See *Bank of Nova Scotia,* 487 U.S. at 259." [APPENDIX EXHIBIT "A"]

As evidence of the necessity for this Court to clarify the *Bank of Nova Scotia, supra,* exception for cases in which the grand jury's independence is infringed, recent Fourth Circuit decisions do nothing to clarify the standards for indictment dismissal, and only add to the body of decisions repudiating the power of the courts to maintain any control over the prosecutor's conduct before the grand jury.

In *United States v. Burns,* 990 F. 2d 1426, 1436 (4th Cir. 1993), cert. denied ____ U.S. ____, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) the Court observed:

"[A]lthough it is true that the lower federal courts possess certain supervisory powers to control their own procedures in the interests of fundamental principles of liberty and justice, see *United States v. Williams,* 112 S. Ct. 1735, 1741 (1992) it is equally true that the Supreme Court never has fully explored the source of or the limitations on these powers. See *Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 Colum. L. Rev. 1433, 1433-34 (1984). The Court has made one principle quite clear, however; the supervisory power of the federal courts of appeals may

not be used to prescribe prosecutorial conduct 'in the first instance', before a grand jury." *Id.* at 1436.

From this that Circuit has concluded that because the grand jury is an institution separate from the Courts, over whose functioning the courts do not preside, no supervisory judicial authority exists with respect to its workings. It is submitted that this is not the intended result of *Bank of Nova Scotia, supra,* and indeed that it is a result inconsistent with our long history of preserving the integrity of the grand jury.

Similarly in *United States v. Mills,* 995 F. 2d 480 (4th Cir. 1993) cert. denied ____ U.S. ____, 114 S. Ct. 283, 126 L. Ed. 2d 233 (1993) the Fourth Circuit observed that "the Supreme Court's holdings under the Fifth Amendment's Indictment Clause teach that courts lack authority to review either the competency or sufficiency of evidence which forms the basis of an indictment and may not quash indictments when the errors which produce them, such as prosecutorial misconduct or violation of a statute, do not affect substantial rights." *Id.* at 490 (Citing *Bank of Nova Scotia, supra, Mechanik, supra, and Costello, supra.*

The Fourth Circuit's interpretation of *Bank of Nova Scotia, supra,* and its progeny pays lip service to the exception clearly carved out by the Supreme Court for cases in which the grand jury's independence is infringed, while ignoring it in practice.

The *Bank of Nova Scotia, supra* decision is explicit in adopting the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik, supra* only where dismissal is sought for nonconstitutional

error. *Bank of Nova Scotia, supra* at 2374. Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik, supra* at 945-946.

The conclusion of *Bank of Nova Scotia, supra* that a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant in fact is based on the fact that the violations which occurred were nonconstitutional and were unrelated to the grand jury's independence and decisionmaking process.

The clear implication to be derived therefrom is that where the misconduct violates the constitution, or where it substantially influences the grand jury's decision to indict, or where there is grave doubt that the decision to indict was free from the substantial influence of such violations, the indictment must be dismissed.

The instant case arguably meets all of three of the above criteria.

The Court is urged to find that the prosecution's statements to this grand jury did indeed effect a substantial right - the right to a fair and impartial jury as guaranteed by the Fifth Amendment to the United States Constitution.

To use an analogy - the very best writing - the books we can't put down - are those in which we are invited by the author to see ourselves. The writing which

appeals to us the most is that which draws us into it. That is precisely what the author of this prosecution did. By drawing the grand jurors into the perjury and importuning them to create the right atmosphere for its occurrence, she made them co-authors of a script which invited no deviation. Indeed, shortly after the witness' testimony when the prosecutrix suggested there was additional evidence the foreman echoed the sentiments of a grand jury eager to fulfill its mission when he said "would we be able to get it to the Judge?" The evidence in the case had become irrelevant - they were passing upon their own work product. The prejudice inherent in this cannot be denied. [Ct. of Appeals Appx. I, p.].

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape nor the innocent suffer. He may prosecute with vigor - indeed he should do so. But while he may strike hard blows he is not at liberty to strike foul ones." *Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 134 (1935).

The Court is respectfully urged to restore justice, not only in this case in which the defendant was deprived of his right to a fair and impartial grand jury, but in the

countless cases in which prosecutorial misconduct, for so long unchecked, has usurped the very function of the grand jury system.

CONCLUSION

Based upon the reasons aforesaid, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted:
D. LYNN WHITTED
Counsel of Record
P.O. Box 10615
Goldsboro, N.C. 27532
Tele: 919-735-8738
Fax: 919-580-9482